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Supreme Court, U.S.
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No. 85-112

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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LITTLE CROW MILLING CO., INC.,
MIDSTATE MILLS, INC., and
THE PILLSBURY COMPANY,
*Petitioners,*

v.

BALTIMORE & OHIO RAILROAD,
CHESAPEAKE & OHIO RAILWAY CO.,
CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD,
CONSOLIDATED RAIL CORP.,
ILLINOIS TERMINAL RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY, and
SOUTHERN RAILWAY CO.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## REPLY BRIEF OF PETITIONERS

The respondent railroads oppose the Petition for a Writ of Certiorari in two briefs.[1] These briefs illustrate the importance of the question presented in this case and are in themselves strong arguments in support of the Petition.

[1] Respondents Norfolk & Western Railway Co., Southern Railway Co., and Illinois Terminal Railroad Co. joined in one brief (hereinafter referred to as N&W Brief), while Consolidated Rail Corporation, Baltimore & Ohio Railroad Co., Chesapeake & Ohio Rail-

The case at bar is controlled by two salient facts largely ignored by the railroads: (1) the challenged conduct has been found unlawful under the Interstate Commerce Act, and (2) the challenged conduct occurred after Congress began deregulating railroads. These facts precisely frame the question presented by this case—whether the railroads' conduct, no longer subject to traditional regulatory review and also unlawful under the Interstate Commerce Act, is to be, nonetheless, impliedly immune from antitrust treble damage actions. Both the petitioners and the respondent railroads agree that the answer to this question will impact the regulatory schemes and their ability to function within those schemes. Thus, this question and all its ramifications deserve review by this Court.

The Seventh Circuit below implied an immunity based upon this Court's decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). On the other hand, three of the key federal agencies responsible for enforcing the transportation and antitrust laws, the Interstate Commerce Commission, the Department of Justice and the Department of Transportation, have already joined to urge this Court to reconsider *Keogh*. *See* Brief for the United States as Amicus Curiae in Support of Petitioners, *Square D Co. v. Niagara Frontier Tariff Bureau*, 760 F.2d 1347 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (No. 85-21) (1985). Consideration of this case would permit the Court not only to reconsider *Keogh* [2], but also, perhaps more significantly, to

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way Co., and Chicago South Shore & South Bend Railroad Co. joined in filing a second brief (hereinafter referred to as Conrail Brief).

[2] *Keogh*, of course, involved rate regulation of railroads. *Square D*, on the other hand, involves rates instituted by motor carrier rate bureaus. If *Keogh* is to be reconsidered, a railroad rate regulation controversy would be a natural and logical vehicle. In addition, the historical differences between railroad and motor carrier regula-

address its application in the context of a deregulated rail rate found unlawful by the ICC.

(1) The federal transportation regulatory scheme has not remained stagnant since *Keogh* was decided in 1922. It has evolved over the years, with Congress frequently modifying the objectives, rights and remedies expressed in the statutes and the concomitant powers of the regulatory agencies involved. Since the mid-1970's, congressional and administrative efforts to lessen federal economic regulation of air, surface, and ocean transportation have reduced regulatory control of airlines, railroads, motor carriers, freight forwarders and water carriers.[3]

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tion by the ICC, particularly the rights and remedies available under the Interstate Commerce Act, make this case the more appropriate vehicle. For instance, *Keogh*'s denial of a treble damage remedy was due to the existence and availability of a reparations remedy against rail carriers under the Act. 260 U.S. at 162. However, for over thirty years, shippers had no reparations remedy against motor carriers for unreasonable and/or discriminatory rates. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959). Only in 1965 were shippers afforded this remedy. Act of Sept. 6, 1965, § 6, Pub. L. No. 89-170, 79 Stat. 648, 651 (codified as amended at 49 U.S.C. § 11705(b)(3)). Of course, by 1965 Congress had already passed the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948). Thus, for motor carriers, the issue of *Keogh* is in a slightly different light, *i.e.*, whether in 1965 Congress intended to imply an immunity from treble damage actions when it granted a reparations remedy in light of its previous grant of express immunity in the Reed-Bulwinkle Act.

Both *Square D* and this case present questions which warrant review by this Court. The questions which each presents, however, are independent from the other and may not be fully treated if only one case is reviewed by this Court.

[3] *See, e.g.*, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011; Motor Carrier

The philosophy behind federal regulation of these entities has changed. In 1922, regulation of railroads was all-encompassing; the concepts of free market competition and railroad regulation were mutually exclusive. Since the mid-1970's, particularly since the passage of the Railroad Revitalization and Regulatory Reform Act of 1976, the purposes and goals of railroad regulation have undergone a dramatic metamorphosis.[4]

(2) The primary basis for the Seventh Circuit's ruling was a belief that an antitrust damage action inherently conflicted with the remaining powers and duties of the ICC to determine when rates are discriminatory. Pet. App. 11a. The railroads advocate this position. *See* Conrail Brief at 8-10; N&W Brief at 14. This alleged conflict has been fully addressed in the Petition. However, since the Petition was filed, the ICC itself has informed this Court that no irreconcilable conflict exists:

> [A]n antitrust damage award premised on a rate lower than that filed by a carrier would not necessarily pose even a theoretical inconsistency with the ICC's regulatory authority. Moreover, as a practical

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Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102, and Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67.

[4] For example, in passing the Staggers Rail Act in 1980, the Committee on Conference summarized its findings:

> The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads and to maintain a national railroad network as an essential part of the national transportation system. However, today, most transportation is competitive and many of the Government regulations affecting railroads have become unnecessary and inefficient. . . . Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads, to save energy and to combat inflation.

H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 (1980).

> matter, it is extremely unlikely that damage actions would result in any actual interference with the ICC's exercise of its regulatory authority because, as this Court noted in *ICC v. American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), slip op. 6 n. 4, the ICC is currently capable of reviewing only an insignificant fraction of the total tariffs filed.

*See* United States Amicus Brief at 12-13 (footnotes omitted). This has long been the ICC's posture as to tariffs found unlawful as violative of the Interstate Commerce Act:

> [R]elief from the antitrust laws . . . obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission.

*Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975).

(3) The railroads erroneously contend that the Seventh Circuit properly relied upon *Keogh* in ruling that treble damages were unavailable to the shippers. *See* N&W Brief at 6-9; Conrail Brief at 7-8. In order to immunize the railroads' conduct, the Seventh Circuit had to extend *Keogh* far beyond its facts to cover conduct held unlawful by the ICC. The decision below is the first instance where *Keogh* has been applied to bar treble damage antitrust relief for injuries from conduct unlawfully violating the Interstate Commerce Act. In *none* of the litany of cases cited by the railroads were rates found unlawful under the Interstate Commerce Act at issue.[5] Notwithstanding the issue of whether *Keogh* remains viable today, the

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[5] For example, in Minsky v. Auto Driveaway, 734 F.2d 18 (7th Cir. 1984) (dec. without opinion), 757 F.2d 718 (7th Cir. 1985) (per curiam opinion published), *cert. denied*, 105 S. Ct. 435 (1984), the ICC did not find the challenged tariffs unlawful. Moreover, in *Minsky*, the alleged conspiracy ended prior to the deregulation of motor carriers in 1980. *Minsky* is certainly not controlling here because it involved a different regulatory scheme and involved lawful tariffs.

railroads have not presented any justification for the Seventh Circuit's unprecedented extension of *Keogh*'s holding.

(4) The railroads argue that *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), and *ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984), do not overrule *Keogh*.[6] *See* N&W Brief at 9-14; Conrail Brief at 10-11. Petitioners do not make this argument. Rather, plaintiffs argue that the decision below is inconsistent with *Carnation* and *ATA* precisely because the Seventh Circuit improperly extended *Keogh* to immunize an unlawful tariff. *Keogh* involved rates which were completely lawful under the regulatory scheme. Conversely, *Carnation* involved rates that were established in violation of the regulatory scheme. To reach its holding in *Carnation*, this Court did not need to overrule or even address *Keogh*. In view of *Carnation*, this Court again need not overrule or address *Keogh* to reverse the decision below; it need only state the obvious: *Carnation* is not of limited application, but subjects all conduct which is in violation of any regulatory scheme to the antitrust laws. In the final analysis, *Carnation*, not *Keogh*, is the controlling precedent in this case.

The railroads seek to diminish the import of *Carnation* by drawing a distinction between the powers of the ICC and the Federal Maritime Commission. The railroads treat this distinction as a talisman, hoping to ward off any objective analysis of *Carnation*'s impact on this case. However, this distinction is not based in fact. *See* Petition at 10.

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[6] One group of railroads acknowledge that *ATA* "did not purport to make a definitive ruling as to the consequences of a finding of unlawfulness." *See* N&W Brief at 12, n. 10. Petitioners suggest that this case is the appropriate vehicle for this Court to address this issue and reaffirm that the holding of *Carnation* extends to conduct in violation of any regulatory scheme.

According to the railroads, the ICC's regulatory power, unlike that of the FMC, is so pervasive that shippers' damages must be limited to the remedies available under the Interstate Commerce Act. Even if this distinction could have been drawn prior to the deregulation of railroads, it can no longer be said that regulation of railroads is all-pervasive.[7] *Keogh* has been used by the Seventh Circuit without any real analysis of whether *current* ICC regulation and available administrative remedies continue to justify the application of *Keogh* in antitrust cases involving the ICC but not the FMC. The rote application of *Keogh* and the rote distinctions between the regulatory powers of the FMC and ICC fail to survive serious study.

The railroads attempt to interpret *ATA* as supporting the dismissal of the shippers' treble damage claims by suggesting that only when the ICC has found a "substantive" unlawfulness can the antitrust laws apply. *See* N&W Brief at 12-13; Conrail Brief at 10-12.[8] However,

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[7] *See, e.g.*, Transkentucky Transportation R.R. v. Louisville and N. R.R., 581 F. Supp. 759, 764 (E.D. Ky. 1983) (since deregulation, antitrust and Interstate Commerce Act objectives are "mutually compatible").

[8] Conrail's contention that the ICC confirmed that the Plan B rates remained the only lawful rate in effect (*see* Conrail Brief at 12) is nothing short of a blatant misreading of the ICC's final decision. The ICC clearly and unmistakably held that the tariffs containing the rates violated 49 U.S.C. § 10706(a)(2)(A) and therefore were unlawful. *See* Transit on Wheat Between Reshipping Point and Destination, 365 I.C.C. 890, 898, 901 (1982).

Conrail essentially argues that for an effective tariff to be "unlawful", the ICC must first retroactively reject the tariff and declare it *void ab initio*. This argument is actually a mischaracterization of the traditional distinction, recognized by this Court, between a "legal" rate and a "lawful" rate. *See* Arizona Grocery Co. v. Atchison, T., & S.F. Ry., 284 U.S. 370, 384 (1932). The Plan B rates were "legal" while in effect and the railroads were bound to collect the rates unless and until the ICC declared them unlawful; once the ICC found the rates to have been unlawfully promul-

the railroads have express immunity even if the rates are "substantively" unlawful, absent a "procedural" defect in the railroads' compliance with the Reed-Bulwinkle Act.[9] Thus, the railroads are in reality arguing that the ICC must find both procedural and substantive unlawfulness before the antitrust laws apply. This argument emasculates Congressional efforts to deregulate railroads. Because the ICC's power over the reasonableness of rates has been drastically limited, the circumstances when both procedural and substantive unlawfulness can be found have been correspondingly limited. Moreover, the Interstate Commerce Act does not draw a distinction between so-called procedural and substantive unlawfulness. Both the motor carrier reparations provision (49 U.S.C. § 11705(b)(3)) and the railroad reparations provision

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gated, the tariffs were unlawful from inception. The ruling of unlawfulness was not, as the railroads argue, prospective only; the ICC only held that the shippers who protested the unlawful rates suffered no damages cognizable under the reparations remedy. *Keogh* itself recognized the distinction between legal and lawful rates:

> The legal rights of a shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.

260 U.S. at 163.

There is no statutory conflict when treble damage relief is based upon unlawful tariffs. It is merely whether treble damages should also be made available as an "entirely collateral" remedy, *see Carnation*, or, conversely, whether such relief would be "plainly repugnant" to the regulatory scheme. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). The critical regulatory agency involved, the ICC, does not view such relief as being repugnant to its operations.

[9] *Cf.*, National Ass'n of Recycling Indus. v. American Mail Line, Ltd., 720 F.2d 618 (9th Cir. 1983) (unreasonably high tariff rates not subject to treble damage actions when express immunity provisions of Shipping Act not violated).

(49 U.S.C. § 11705(b)(2)) refer only to damages based upon actions "in violation of this subtitle" (*i.e.*, the Revised Interstate Commerce Act). The ICC has also premised immunity from the antitrust laws solely upon so-called procedural compliance with the Reed-Bulwinkle Act. *See Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975). If the railroads' argument is accepted, deregulation will have the unexpected and unintended result of further freeing the railroads from the antitrust laws. This result flies squarely in the face of Congressional intent.

Respectfully submitted,

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Dated: September 12, 1985